Nurasmira Maulat bt Abd Jaffar & Ors v Ketua Polis Negara & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–339–10 OF 2013
LINTON ALBERT, HAMID SULTAN AND VERNON ONG JJCA
8 OCTOBER 2014

Damages — Quantum — Appeal — Police team shot dead father of surviving children — Whether act of self-defence — Whether police protected under s 24 of the Police Act 1967 — High Court refused damages for loss of dependency and damages — Whether earnings of deceased proved — Whether decision of the High Court justified — Whether damages sought reasonable

The appellants appealed against the decision of the High Court judge in refusing damages for loss of dependency, exemplary and aggravated damages for the death of the father as a result of having been shot by the police. The third defendant in the High Court and the head of the police team who were at the material time patrolling saw two cars travelling together and the deceased was in the car. The two vehicles were stopped and DW1 went to the car and identified himself as a police officer and at the same time heard DW2 screaming 'Tuan dia tembak'. DW1 immediately directed to open fire. The deceased and three others in the car were killed. The defendants did not dispute the killing but submitted that it was done in defence and relied on s 24(1)(b) of the Police Act 1967 ('the Act'). However, the judge had not dealt with whether s 24 of the Act entitled the police to use excess force and/or kill and no other provision was relied on by the defendants to say that the police force had power to assassinate suspected criminals, taking into consideration art 5 of the Federal Constitution. On the issue of quantum as to dependency claim relating to the deceased's children aged 15, 8 and 7 respectively, the plaintiffs claimed a sum of RM1,000 per month. The defendants argued that it should not be allowed as earnings was not proved and further averred that a sum of RM500 per month would be more of a reasonable figure if the court was minded to award.

Held, allowing the appeal:

(1) The trial judge failed to consider that the defendants stood as ordinary litigants and were not entitled to the benefit of s 114(e) of the Evidence Act 1950 which related to the presumption 'that judicial and official act have been regularly performed'. The killing of the deceased had nothing to do with judicial or official act. The court should have taken into consideration that all the main witness for the defence were interested witness and no independent witness was called though the incident took

place in day light and public place. There was evidential shortcoming in the case. The pleaded case of the defendant in respect of the gun was a different serial number and the gun produced in the court was another. This itself would be fatal to the defence case. There were many more shortcomings in the assessment of the evidence (see para 10).

(2) Section 24 of the Act does not give the police any powers to kill. On the face of the pleadings, evidence, the defence of 'self defence' in reliance of s 24 must fail. The police force had not been endowed with 'executioners' powers, in the pretext of self-defence. The law of Malaysia or the Federal Constitution does not permit the police officers to kill suspected and/or dreaded criminals by fake encounters. The police are paid through public funds with a primary duty to arrest criminals and put them for trial. They cannot be allowed to roam trigger happy as this will be in violation of rule of law and the relevant authorities must seriously check such violation (see paras 11, 15(a) & (c)).

(3) A sum of RM500 ought to be sustained. The sum of RM51,000 was fair and reasonable (see para 15(h)).

[Bahasa Malaysia summary

Perayu-perayu merayu terhadap keputusan hakim Mahkamah Tinggi dalam menolak ganti rugi untuk kehilangan tempat bergantung, ganti rugi teladan dan tambahan untuk kematian bapa akibat ditembak oleh polis. Defendan ketiga di Mahkamah Tinggi dan ketua pasukan polis yang pada masa material membuat rondaan melihat dua kereta bergerak bersama dan si mati berada dalam kereta. Kedua-dua kenderaan diarah berhenti dan DW1 menghampiri kereta dan memperkenalkan dirinya sebagai pegawai polis dan pada masa yang sama mendengar DW2 menjerit 'Tuan dia tembak'. DW1 dengan serta merta mengarah untuk membuat tembakan. Si mati dan tiga yang lain di dalam kereta terbunuh. Defendan-defendan tidak mempertikaikan pembunuhan tetapi berhujah yang ia dibuat dalam mempertahankan diri dan bergantung ke atas s 24(1)(b) Akta Polis 1967 ('Akta'). Walau bagaimanapun, hakim tidak mempertimbangkan sama ada s 24 Akta memberikan hak kepada polis untuk menggunakan kuasa berlebihan dan/atau membunuh dan tiada peruntukan yang lain yang digunakan oleh defendan untuk menyatakan bahawa pasukan polis mempunyai kuasa untuk membunuh penjenayah yang dicurigai, dengan mengambil kira perkara 5 Perlembagaan Persekutuan. Atas isu kuantum terhadap tuntutan tempat bergantung berkaitan anak-anak si mati berumur masing-masing 15, 8 dan 7, plaintif-plaintif menuntut jumlah sebanyak RM1,000 sebulan. Defendan-defendan berhujah bahawa ia patut tidak dibenarkan kerana pendapatan tidak dibuktikan dan selanjutnya berhujah bahawa sejumlah RM500 sebulan adalah jumlah yang lebih munasabah jika mahkamah ingin memberikan award.

Diputuskan, membenarkan rayuan:

(1) Hakim perbicaraan gagal untuk mempertimbangkan bahawa defendan-defendan adalah litigan biasa dan tidak berhak kepada faedah s 114(e) Akta Keterangan 1950 yang berkaitan kepada anggapan 'that judicial and official act have been regularly performed'. Pembunuhan si mati tidak mempunyai kaitan dengan kehakiman atau tindakan rasmi. Mahkamah sepatutnya mempertimbangkan bahawa kesemua saksi utama untuk pembelaan adalah saksi berkepentingan dan bukan saksi bebas yang dipanggil walaupun kejadian tersebut berlaku pada siang hari dan di tempat awam. Terdapat kelemahan keterangan dalam kes tersebut. Kes yang diplidkan oleh defendan berkenaan pistol adalah di mana nombor sirinya berlainan dan pistol yang dikemukakan di mahkamah adalah yang lain. Ini dengan sendirinya akan menjadi fatal kepada kes pembelaan. Terdapat banyak kelemahan dalam penilaian keterangan (lihat perenggan 10).

(2) Seksyen 24 Akta tidak meberikan polis apa-apa kuasa untuk membunuh. Atas pliding, keterangan, pembelaan 'self defence' dalam pergantungan kepada s 24 mesti gagal. Pasukan polis tidak diberikan dengan kuasa 'executioners', dalam dalih mempertahankan diri. Undang-undang Malaysia atau Perlembagaan Persekutuan tidak membenarkan pegawai-pegawai polis untuk membunuh penjenayah yang dicurigai dan/atau yang amat ditakuti melalui pertembungan palsu. Polis dibayar melalui dana awam dengan tugas utama untuk menangkap penjenayah dan meletakkan mereka untuk perbicaraan. Mereka tidak dibenarkan untuk menembak sesuka hati kerana ini adalah mencabuli peraturan undang-undang dan pihak berkuasa yang relevan mesti dengan serius memeriksa pencabulan sedemikian (lihat perenggan 11, 15(a) & (c)).

(3) Sejumlah RM500 patut dikekalkan. Jumlah sebanyak RM51,000 adalah adil dan munasabah (lihat perenggan 15(h)).]

Cases referred to

Ashley v Chief Constable of Sussex Police [2008] 2 WLR 975, HL (refd)

Common Cause, a Registered Society v Union of India (1999) 6 SCC 667, SC (refd)

DK Basu v State of West Bengal (1997) 1 SCC 416, SC (refd)

Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal [2015] 1 MLJ 353, CA (refd)

Ganesan and another v State of Tamil Nadu and others [2012] Indlaw Mad 45 (refd)

K Elango and others v Secretary of State of Tamil Nadu and others [2013] Indlaw Mad 1425 (refd)

Lai Kim Hon & Ors v PP [1981] 1 MLJ 84; [1980] 1 LNS 197, FC (refd)

N Indra a/p Nallathamby (administratrix of the estate and dependant of Kugan a/l Ananthan, deceased) v Datuk Seri Khalid bin Abu Bakar & Ors [2014] 8 MLJ

625; [2013] 6 CLJ 272, HC (refd)
Nilabati Behera @ Lalitha v State of Orissa and others AIR 1993 SC 1960, SC (refd)
Om Prakash and Ors v State of Jharkhand through the Secretary, Department of Home, Ranchi-1 and Anor (2012) 12 SCC 72, SC (refd)
RHB Capital Bhd v Carta Bintang [2012] 10 MLJ 469; [2012] 1 LNS 317, HC (refd)
Rookes v Barnard [1964] 1 All ER 367; [1964] AC 1129, HL (refd)
Sakshi Sharma w/o Rajesh Sharma and others v State of Himachal Pradesh and others [2012] Indlaw HP 1474 (refd)

Legislation referred to

Civil Law Act 1956 ss 7, 8, 8(2)
English Law Reform (Miscellaneous Provisions) Act 1934 [UK]
Evidence Act 1950 ss 101, 102, 103, 114(e)
Federal Constitution art 5
Indian Penal Code [IND] s 330
Penal Code s 331
Police Act 1967 s 24, 24(1)(b)
The Constitution of India [IND] art 21

Appeal from: Civil Suit No S-21–310 of 2009 (High Court, Kuala Lumpur)

V Rajadevan (Rajadevan & Assoc) for the appellants.
Habibah bt Haron (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellants (dependent — children) appeal against the decision of the learned High Court judge refusing damages for loss of dependency, exemplary and aggravated damages for the death of the father as a result of having been shot by the police was heard on 10 September 2014 and upon hearing we reserved judgment. My learned brothers Linton Albert JCA and Vernon Ong Lam Kiat JCA have read the draft judgment and approved the same. This is our judgment.

[2] What is important to note in this case is that the plaintiffs have not framed the case under negligence but are in essence seeking exemplary damages for constitutional breach for violation of art 5 of the Federal Constitution as well as a claim for dependency under Civil Law Act 1956 for causing wrongful death (see paras 4–9 of the statement of claim). However, the learned senior federal counsel has anchored the arguments based on negligence and says that the plaintiffs are not entitled to exemplary damages, in consequence of s 8(2) of the Civil Law Act, which states:

8(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person —

(a) shall not include any exemplary damages, any damages for bereavement made under subsection 7(3A), any damages for loss of expectation of life and any damages for loss of earnings in respect of any period after that person's death.

[3] Sections 7 and 8 of the Civil Law Act have everything to do with common law cause of action, in essence tort, and comes within the jurisprudence of private law remedy. And s 8(2) does not pave way for a claim of exemplary damages. When a complaint is related to breach of fundamental guarantee under the Federal Constitution, it attracts public law relief and there are a number of authorities to support the proposition that exemplary damages is permissible. We will deal with this issue further in the judgment, even though the submission of learned counsel as well as the federal counsel on the issue of exemplary damages was not satisfactory and was of no assistance to the court to determine the quantum.

[4] The submission of learned counsel for the appellant reads as follows:

Article 5 of the Federal Constitution provides that no person shall be deprived of his life safe in accordance with the law.

Yet on 02/09/08 at 10.00am a Police Team from the Unit Tindakan Khas lead by 3rd respondent shot the deceased 6 times while the deceased was seated in the front passenger seat of a Proton Waja.

The Respondents' defence was that they shot in self defence as the deceased had shot at them first.

The only issue for determination was whether the respondent had acted in self defence?

The learned trial judge correctly identified the issue for determination. However, she erred in her finding when she concluded that the deceased had shot at the respondents and the respondents acted in self defence.

It is respectfully submitted that the learned trial judge failed to appreciate/insufficient judicial appreciation of the evidence.

(a) The police sketch plan show the marking Y. This is where DW3 found the bullet casing (kelongsong peluru). It clearly shows how the police party surrounded the deceased car and shot him from close range.

(b) The position of the police vehicles also show clearly how the police cars surrounded the deceased car in the ambush.

(c) DW3 testified that no bullet casing was found in the car in which the deceased was seated when the police shot him. The absence of casing (kelongsong peluru) was clear evidence that the deceased didn't fire at the police.

(d) DW3 also testified that he found one bullet stuck in the gun which the respondent's claim they found in the car. DW3 said this is a stoppage. He clearly testified that if there are stoppages, there will be no firing sound (bunyi tembakan).

(e) This means DW1 and DW2 were not telling the truth when they said they heard a gun shoot.

(f) The gun tendered in court as purportedly recovered from the car was not the gun produced in the court. The serial number of the gun recovered from the car was M002893 but DW4 the chemist said that the gun send to him for analysis had serial number M002895.

(g) The learned trial judge erred when she held that there was no Gunshot Residue (GSR) on the deceased's hand because of blood stains. The evidence of the pathologist PW1 was that he took samples using a gunshot residue kit and gave it to the I.O. (DW5) to be sent to the chemist for analysis. DW3 also used a GSR kit at the scene of the shooting and gave it to the I.O. for chemist analysis. DW5 testified that the chemist report confirmed that there was no GSR on the right and left hand of the deceased.

The selective police photos tendered in court by the respondents show in photo C a gun.

A close scrutiny of this photo will show the deceased right hand in a clenched position as if pulling the trigger of a gun. Yet the gun has been neatly placed in the compartment in front of the gear knob. How did this happen?

A close scrutiny of the evidence of DW1 and DW2 will show that their evidence is inherently incredibly.

DW1's evidence Q & A Witness Statement is incredible. He was walking towards the deceased car when he heard gun shot at the same time SM Kamal shouted 'Tun, dia tembak' and DW1 instructed his men to shoot back.

It is respectfully submitted if the learned trial judge had consider the evidence in its proper perspective she would had held that the respondent actually shot the deceased wrongly and that the deceased never shot the respondents.

PRELIMINARIES

[5] In the instant case, the learned trial judge in a nine page judgment had summarised the law and facts sufficient to say that it is a speaking judgment. However, the judgment on the face of record shows error of law of grave nature which requires this appellate court to revisit the evidence and come to a just conclusion.

[6] In the instant case, the learned trial judge had rightly identified that the main issue for determination was whether the police had acted in self defence. And at the conclusion of the judgment the judge says:

> It is trite law that the burden of proof is on the plaintiff (see ss 101, 102 of the Evidence Act 1950). I find that the plaintiffs have failed to prove their claim on the balance of probabilities and accordingly their claim is dismissed with costs.

[7] There was nothing in the judgment to say the defendants having relied on the defence of 'self defence' had discharged the burden. In addition, once the defendant admits liability but relies on a defence to the claim to exonerate liability in total then not only does the burden lie on the defence but also the court ought to proceed with case as though the defendant was the plaintiff (see *RHB Capital Bhd v Carta Bintang* [2012] 10 MLJ 469; [2012] 1 LNS 317). He who alleges must prove does not necessarily mean the burden of proof always rests on the plaintiff. The burden will shift according to the facts as well as the allegation set-out in the defence. Section 101 of the Evidence Act 1950 must not be literally applied without taking into consideration ss 102 and 103 and the facts of the case. The authors of *Janab's Key To Law of Evidence*, (4th Ed), revised by Dato' Mah Weng Kwai at p 625 in relation to s 102 say:

> This section lays down a test for ascertaining on which side the burden of proof lies, ie who will fail if no evidence at all were given? The test is that burden of proof lies upon the party whose case will fail if no evidence were given on either side. Thus, the plaintiff in a civil action or the public prosecutor in a criminal proceeding must prove all facts essential to their case. However, once the plaintiff or prosecutor has succeeded in introducing the evidence in his favour then it is said that the burden shifts to the opposing side to introduce opposing evidence. Thus, the test for 'onus of proof' is which party will fail if no evidence is given on a particular point of the case. The 'onus of proof' does not rest on one party constantly. However, the burden of proof of establishing the case never shifts. (See *Selvaduray v Chinniah* [1939] 1 MLJ 253; *Wong Sieng Ping v Public Prosecutor* [1967] 1 MLJ 56).

BRIEF FACTS

[8] ASP Ong Seng Keong ('DW1'), ie the third defendant and head of the police team who were at the material time patrolling Section 13 Shah Alam, saw two cars travelling together and the deceased was in the car. The two vehicles were stopped and DW1 went to the car and identified himself as police officer and at the same time heard 'DW2' (Sarjan Kamal from the police team) scream 'Tuan dia tembak'. DW1 immediately directed to open fire. The deceased and three others in the car were killed. The defendants do not dispute the killing but say it was done in defence and rely on s 24(1)(b) of the Police Act 1967.

[9] It is not in dispute that six gun shots had pierced the body of the deceased who was in the driver's seat and the learned judge had not dealt with

whether s 24 of the Police Act 1967 entitles the police to use excess force and/or kill and no other provision was relied on by the defendants to say that the police force has power to assassinate suspected criminals taking into consideration art 5 of the Federal Constitution which states:

> 5(1) No person shall be deprived of his life or personal liberty save in accordance with law.

Section 24 of the Police Act 1967 says:

> 24(1) Any police officer may—
>
> (a) stop and detain any person—
>
> (i) whom he sees doing any act or who is in possession of anything; or
>
> (ii) whom he has reasonable grounds for suspecting is doing any act oris in possession of anything;
>
> for which a licence, permit or authority is required under any law in force, for the purpose of requiring such person to produce such licence, permit or authority.
>
> (b) stop and search without warrant any vehicle or vessel which he has reasonable grounds for suspecting is being used in the commission of any offence against any law in force.

[10] In addition, the learned judge had failed to consider that the defendant stands as an ordinary litigant and is not entitled to the benefit of s 114(e) of the Evidence Act 1950 which relates to the presumption 'that judicial and official act have been regularly performed'. The killing of the deceased has nothing to do with judicial or official act. The court should have taken into consideration that all the main witness for the defence were interested witness and no independent witness was called though the incident took place in day light and public place, etc. Further, there was evidential short coming in the case. The pleaded case of the defendant in respect of the gun was a different serial number and the gun produced in the court was another. This itself will be fatal to the defence case. There are many more short comings in the assessment of the evidence which need not be repeated as learned counsel for the plaintiffs have highlighted in the submission.

[11] In our view s 24 does not give the police any powers to kill. On the face of the pleadings, evidence, the defence of 'self defence' in reliance of s 24 must fail. The statement of defence which sets out the defendants' case as well as the serial number of the gun which is in issue is set-out verbatim for purpose of deliberation and it reads as follows:

> (1) Defendan-defendan tidak mempunyai pengetahuan mengenai Perenggan 1 Pernyataan Tuntutan Terpinda.
>
> (2) Defendan-defendan menafikan perenggan 2 Pernyataan Tuntutan Terpinda.

2a. Defendan-defendan mengakui perenggan 2a Pernyataan Tuntutan Terpinda.

(3) Setakat mengakui bahawa pasukan tersebut diketuai oleh Defendan Ketiga, lain-lain pernyataan di dalam perenggan 3 Pernyataan Tuntutan Terpinda adalah dinafikan dan Defendan-defendan selanjutnya menyatakan bahawa:

(a) Pada 02.09.2008 jam 10 pagi, Defendan Ketiga ASP Ong Seng Keong dan 7 orang anggota-anggota polis D9 (Pasukan Polis tersebut) sedang melakukan rondaan mengesan penjenayah di persekitaran kawasan Seksyen 13 Shah Alam dengan menaiki 3 buah kereta;

(b) Pasukan Polis tersebut terserempak 2 buah iaitu kereta Proton Waja berwarna perak nombor pendaftaran WJK 1770 (kereta Waja) dan kereta Proton Perdana V6 berwarna hitam bernombor pendaftaran WAJ 905 (kereta Perdana) di Seksyen 13 Shah Alam yang kelihatan dalam keadaan mencurigakan.

(c) Pasukan Polis tersebut kemudiannya telah mengekori kedua-dua kereta tersebut dan apabila sampai di Batu Tiga berhampiran susur masuk stesyen minyak Esso di Lebuhraya Persekutuan, mereka seterusnya menghimpit kereta-kereta tersebut berdekatan dengan perhentian bas untuk memaksa kedua-dua kenderaan tersebut berhenti untuk tujuan pemeriksaan.

(d) Sewaktu Pasukan Polis menghampiri kereta-kereta tersebut dan memperkenalkan diri sebagai polis, tiba-tiba tembakan telah dilepaskan kearah mereka dari kereta Waja tersebut;

(e) Pasukan Polis tersebut terpaksa membalas tembakan bagi tujuan mempertahankan diri;

(f) 4 orang dalam kereta Waja terbunuh termasuk simati manakala kereta Perdana telah melarikan diri dari tempat kejadian;

(g) Hasil pemeriksaan terhadap kereta Waja menjumpai sepucuk pistol jenis Styer M9-A1 No. Siri M002893 di bahagian hadapan, dua bilah parang di bahagian belakang serta satu vest polis;

(h) Hasil pemeriksaan ke atas simati menjumpai gari di poket belakang seluarnya.

(4) Setakat mengakui pasukan UTK diketuai oleh Defendan Ketiga, lain-lain pernyataan di perenggan 4 Pernyataan Tuntutan Terpinda adalah dinafikan dan Plaintif-Plaintif diletakkan di bawah beban bukti yang kukuh dan ketat. Defendan-defendan menegaskan bahawa pada setiap masa yang material, tindakan anggota-anggota polis tersebut adalah dilindungi oleh seksyen 24 Akta Polis 1967.

(5) Defendan-defendan tidak mempunyai pengetahuan mengenai perenggan 5 dan 6 Pernyataan Tuntutan Terpinda dan Plaintif-Plaintif dikehendaki membuktikan dengan kukuh dan ketat.

(6) Defendan-defendan menafikan keseluruhan perenggan 7 Pernyataan Tuntutan Terpinda dan mengatakan bahawa Plaintif-Plaintif adalah tidak layak menuntut gantirugi tambahan.

(7) Defendan-defendan selanjutnya menegaskan bahawa hasil penyiasatan Polis menunjukkan bahawa kereta Waja yang dinaiki simati adalah kereta curi dan bahawa simati adalah orang yang melepaskan tembakan kearah Polis tersebut. Defendan-defendan mengulangi perenggan 4 di atas.

(8) Defendan-defendan menafikan perenggan 8 Pernyataan Tuntutan Terpinda dan Plaintif-Plaintif dikehendaki membuktikan dengan kukuh dan ketat.

(9) Kecuali sebagaimana yang diakui secara nyata di atas, Defendan-defendan menafikan setiap dan tiap-tiap pernyataan fakta yang terkandung dalam Pernyataan Tuntutan Terpinda seolah-olah ia dibuat secara seriatim dan disangkal secara khusus.

(10) Oleh yang demikian, Defendan-defendan memohon supaya tuntutan Plaintif-Plaintif ditolak dengan kos.

[12] The learned trial judge has meticulously set-out the plaintiffs' version and the defendants' version. Much judicial time will be saved if it is set-out verbatim even though the facts are repeated and it reads as follows:

The Plaintiff's contend that the deceased never shot at the police for the following reasons:

(i) The testimony of DW3 the CSI expert showed conclusively that no shots were fired from within the said car as no casing (kelongsong) were found inside the car.

(ii) There was no proof of gunshot residue (GSR) on the deceased's body which further proved that the deceased did not shoot from inside the car.

(iii) PW1, the forensic pathologist who conducted the post mortem had collected samples of GSR from the deceased's hands which were later given to the I.O, DW5 who had admitted that no GSR was found on the hands of the deceased. This meant that the deceased never fired any shot from the said car.

(iv) The gun purportedly recovered from the car was a Steyr M9-A1 No. Siri M002893 according to DW1 but DW4, the chemist had referred to a 'Steyr M9-A1 Siri No. MOO 2895'. Hence, this glaring error which was never explained, casts suspicion on whether the gun was recovered from the car or whether the gun was placed in the car after the police had shot the deceased.

(v) Although photographs were tendered into court, albeit on the morning of the trial, not all photographs taken were put in, particularly a key photo showing the front windscreen of the car which would have shown whether any shots were fired from inside the car. The photographs (D4A and D4C) are also not consistent with the defence version.

(vi) The plaintiffs also took issue with the evidence of DW1 and DW2 as it is claimed, inter alia, that if the deceased had indeed shot at DW2, it is impossible for the deceased to miss as DW2 was within close range. It is also contended that DW2 should have run for cover first before firing back and not continue moving forward.

[13] The defence:

7. The defendants on the other hand contend that at the material time DW1 and his team were patrolling the Section 13 Shah Alam area and had seen the Proton Waja in which the deceased was travelling twice. The Proton Waja was one of 2 cars travelling together. The other car was a black Proton Perdana. Their suspicions aroused, DW1 and his men began tailing both cars from the Shah Alam Stadium through the Kayangan roundabout and onto the Federal Highway heading towards Kuala Lumpur.

8. During their surveillance of the 2 cars, the police team noticed that these 2 cars slowed down each time they neared a petrol station. There were 3 petrol stations in all, an Esso, Shell and Petronas stations that were along the route taken by the 2 cars.

9. When the 2 cars circled back to the Shah Alam Stadium the police team moved in and stopped both vehicles.

10. As the police team stepped out of their cars and approached the Waja which was in front, DW1 identified himself as a police officer whereupon he suddenly heard gunshots and at the same time heard DW2 scream 'Tuan, dia tembak'. DW1 immediately directed his team to open fire.

[14] The learned judge's findings verbatim read as follows.

No GSR:

15. The plaintiffs' contention is that because no GSR was found on the deceased, particularly his hands, it was proved conclusively that the deceased did not fire any shots at the police team, relying on the evidence of PW1 the pathologist and DW3, the CSI expert.

16. With respect, the evidence of PW1 and DW3 do not conclusively establish that no GSR was found on the deceased. PW1 had testified that there were six entry gunshots wounds and two exit wounds on the deceased's body. He confirmed he found no defensive would or soot on both hands. By no soot, PW1 confirmed he meant no GSR. Under cross-examination PW1 said he had used a gunshot residue collection kit and had taken samples of the area around the thumb and palm of both hands of the deceased.

17. He agreed that when the deceased was taken to the hospital the body of the deceased was covered with blood, although not wholly. As noted in his post-mortem report, the shirt and right upper front of the jeans were soaked with blood. PW1 confirmed that there was blood on the deceased's hands. More importantly, he agreed that GSR can be washed off with blood and that GSR presence can only be confirmed by a chemist as GSR may not be discernible to the naked eye if there is only trace amount. PW1 evidence in

short was that he could not see any GSR on the deceased's hands and had taken samples to be sent to the Chemistry Department for further analysis.

18. DW3, the CSI expert testified that on that day, 2 September 2008, he was informed by DW5 that there was a shoot out involving police personnel at around 10.15am. He arrived at the scene of incident at around 11.30am with his forensic team. He found the deceased in a sitting position in the front passenger seat and a Steyr M9-A1 bearing serial No M002895 near the gear knob with a casing struck in the chamber of the firearm and 12 live bullets besides two *parangs* and a police vest at the rear passengers' seat and a spent bullet in the front passenger seat.

19. He gave evidence in (Q & A 10):

> 10 S: Apakah keadaan pistol yang dijumpai dalam kereta saspek?
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> J: Hasil pemeriksaan, saya dapati satu kelongsong dijumpai tersekat dalam chamber. Di dalam keadaan kelongsong tersebut yang tersekat dalam chamber, maka menunjukkan berlakukan 'stoppages' iaitu kegagalan berfungsi.

20. He clarified that when a stoppage occurs, there can be no further shots from the firearm. Under cross-examination, he said he did not find any casing in the front passenger seat. He agreed that one a stoppage occurred, the person in possession of the firearm can no longer fire any shots.

21. The significance of DW3's evidence is that a shot had been fired from the firearm recovered from the Waja before the stoppage occurred as there was a casing found in the chamber of the firearm. If only one shot had been fired, there would, logically speaking, be minimal GSR. Evidence given by PW1 the pathologist was that the deceased's hands were blood stained and his clothes were soaked with blood. He had agreed that the blood would have a 'washing effect' on any GSR on the body. This would in all probability account for the absence of 'soot; to the naked eye'.

22. Even if there was no GSR on the deceased's hands, on the balance of probabilities I am satisfied that the deceased had fired one shot at the police team as they approached the Waja which prompted the police to react by returning fire. This is because one casing was found lodged in the chamber of the firearm recovered from the Waja.

23. From the bullet casings recovered at the scene, it is clear that the exchange of fire occurred at close range. As the defence witnesses testified the whole incident happened very quickly, it took less than ten seconds. If, as contended by the plaintiffs, the intention of the police team was to gun down the passengers of the Waja in cold blood, there is no reason for the police personnel to approach the Waja and then start shooting at close range putting themselves at considerable risk. The fact that the police team approached the two cars merely fortifies the defence version that the police team intended to conduct a search of the cars in light of their suspicious movements and not to gun them down.

24. I am of the view that the police, when they opened fire at the Waja, were acting in self defence after the deceased had shot at them. As such they are protected by s 24 of the Police Act 1967 which provides:

> 24.
> (1) Any police officer may—
>
> (a) stop and detain any person—
>
> (i) whom he sees doing any act or who is in possession of any thing; or
>
> (ii) whom he has reasonable grounds for suspecting is doing any act or is in possession of any thing;
>
> for which a licence, permit or authority is required under any law in force, for the purpose of requiring such person to produce such licence, permit or authority;
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> (b) *stop and search without warrant any vehicle or vessel which he has reasonable grounds for suspecting is being used in the commission of any offence against any law in force.* (Emphasis added.)

The fact that weapons and firearm, a police vest and handcuffs were recovered from the Waja show that the police had reasonable grounds.

25. The plaintiffs also raised the issue of the identity of the firearm recovered from the car, that according to DW1 it was a Steyr M9 A1 No Siri M00 2893 but according to DW4 it was a Steyr M9-A1 Siri No M00 2895, casting doubt as to whether the firearm was actually recovered from the car or placed by the police after the deceased was shot dead.

26. With respect, the discrepancy in the serial numbers of the firearm was never put to the defendant's witnesses. I do not think it is open to the plaintiffs to raise this at the submission stage as the defendant's witnesses were not given any opportunity to explain the discrepancy.

27. The plaintiffs have also submitted that the adverse presumption under s 114(g) of the Evidence Act 1950 should be invoked against the defendants for failure to produce all the photographs taken at the scene, particularly the key photograph of the front windscreen of the Waja which, according to the plaintiffs would prove whether the deceased did in fact shoot at the police.

28. With respect, it must be pointed out that s 114(g) only applies if there has been any withholding of evidence. In this case, the plaintiffs never applied to the police for the police photographs, how then can the plaintiffs now complain of any withholding of evidence on the part of the defendants?

[15] We have read the appeal records, memorandum of appeal and the submission of the parties in detail. After much consideration to the submission of the learned federal counsel, we take the view the appeal must be allowed and our reasons, inter alia, are as follows:

(a) It is trite that police force has not been endowed with 'executioners' powers, in the pre text of self defence. This was eloquently explained by the icon and doyen of the Malaysian Bar, the late Raja Aziz Addruse in an article titled 'Police cannot assume the roles of judges', dated 11 April 1998 published in the *New Straits Times* which reads as follows:

> That the police have a right to self-defence and the requisite use of firearms in the course of apprehending suspects and preventing the commission of crimes is accepted. What has, however, given cause for concern is whether in performing those duties the police have too willingly abandoned all principles of self-restraint when it comes to using firearms. The alarming increase in the number of suspected criminal fatalities bespeaks and possibility of a police force that has forgotten the two crucial principles that define all legal and justified use of force — proportionality and discrimination.

(b) It is also timely for this court to reproduce what Lord President Tun Suffian, sitting in the Federal Court in the case of *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84; [1980] 1 LNS 197 had said and it reads as follows:

> The police force exists to protect the public from criminal elements, and are given wide powers of arrest, search, investigation and so on? To detect offenders, to collect evidence against them and to bring them to book. These powers are to be found in the Criminal Procedure Code and other laws enacted by Parliament, and welcomed by the people. The police are expected to do their duty energetically and efficiently, and on the whole they do that? As witness the comparative peace and tranquillity that exist in the country. But one power the police do not have, and it is most unlikely that Parliament and the people will give it to them, and that is power to assault and torture suspects in their custody, least of all power to kill Parliament and the public expect the police to exercise their power in a civilised and humane way. Those who exceed their powers should not expect to be protected by the law.

And further below had said:

> We have given this matter very anxious consideration. While agreeing with Mr Mah that this is a very serious case and that Malaysia should not be allowed to develop into a police state, we do not think that the sentences on the four appellants are manifestly excessive or manifestly inadequate, and that the learned judge has proceeded on a wrong principle. In the circumstances we affirm the sentences.
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> But this should not be regarded as a precedent in future cases. Members of the force who do their duty in accordance with the law will receive our and public support and encouragement; but those who treat suspects in a cruel manner

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> can expect to receive only very severe punishments from the courts. Parliament and the public will not allow a Savak to be established here, bringing disrepute to those responsible for the government and for the administration of justice.

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(c) It is trite that the law of Malaysia or the Federal Constitution does not permit the police officers to kill suspected and/or dreaded criminals by fake encounters. The police are paid through public funds with a primary duty to arrest criminals and put them for trial. They cannot be allowed to roam trigger happy as this will be in violation of rule of law and the relevant authorities must seriously check such violation. In *DK Basu v State of West Bengal* (1997) 1 SCC 416, the Supreme Court of India in a custodial death case by way of stringent advice stated:

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> How do we check the abuse of police power? Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable forms of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third-degree methods during interrogation.

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(d) The courts are always mindful of the sacrifice of police personnel in maintaining law and order and in that process the unfortunate event in sacrificing the life of police officers in genuine encounter. What is reprehensible and need to be condemned are fake encounters as the facts of the instant case prima facie will show and the failure of the relevant authorities to discipline such officers and worse still claim self defence under the Police Act which has no relevancy to the killing. In *Om Prakash and Ors v State of Jharkhand through the Secretary, Department of Home, Ranchi-1 and Anor* (2012) 12 SCC 72 it was stated:

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> It is not the duty of the police officers to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial. This Court has repeatedly admonished trigger-happy police personnel, who liquidate criminals and project the incident as an encounter. Such killings must be deprecated. They are not recognised as legal by our criminal justice administration system. They amount to State-sponsored terrorism. But, one cannot be oblivious of the fact that there are cases where the police, who are performing their duty, are attacked and killed. There is a rise in such incidents and judicial notice must be taken of this fact. In such circumstances, while the police have to do their legal duty of arresting the criminals, they have also to protect themselves. The requirement

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of sanction to prosecute affords protection to the policemen, who are sometimes required to take drastic action against criminals to protect life and property of the people and to protect themselves against attack. Unless unimpeachable evidence is on record to establish that their action is indefensible, mala fide and vindictive, they cannot be subjected to prosecution. Sanction must be a precondition to their prosecution. It affords necessary protection to such police personnel. The plea regarding sanction can be raised at the inception.

(e) The learned senior federal counsel also did not bring to our attention any laws giving powers to the police the right to shoot at sight or any law relating to self defence or fulfilment of any special operating procedure (SOP), etc. Section 24 of the Police Act 1967 has nothing to do with the self defence to exonerate liability from unlawful killing.

(f) No reasonable tribunal appraised with facts of the case will come to the conclusion that the police had made out a case of self defence in reliance of s 24 of the Police Act. In the instant case, there was a police team involved in blocking the two cars at a public place and it is said within ten seconds all the four persons were shot dead. No evidence was led to show any grave threat that warrant the drastic step and why the shooting incident could not have been avoided, etc. We are of the considered view the whole exercise was not spontaneous act of self defence and it only showed that the four persons were executed by the police officers.

(g) Whether the police officers involved had been charged and/or disciplinary action had been taken is not our concern in this proceeding save to say the courts have a constitutional duty to deal with police excesses and provide the necessary input or directions for appropriate action by the relevant authorities to ensure rule of law is maintained at all times. This observation and direction of the court is sufficient for those involved in the drastic killing to be investigated and/or disciplined and if necessary SUHAKAM ie a statutory body established to protect human rights to pursue the matter further if they have not done so.

(h) On the issue of quantum as to dependency claim relating to the three children aged 15, 8 and 7 respectively, the plaintiffs are claiming a sum of RM1,000 per month for the deceased who was 38 years old. The defendants in principle says it should not be allowed as earnings was not proved, and in the submission say a sum of RM500 per month will be more of a reasonable figure if the court is minded to award. After much consideration to the evidence and submission and the fact that the deceased had three children and was supporting them, a sum of RM500 ought to be sustained. And we accept the submission of the learned federal counsel the sum of RM51,000 is fair and reasonable.

Jurisprudence relating to exemplary damages and the Federal Constitution:

(i) The House of Lords as early as 1964 in *Rookes v Barnard* [1964] 1 All ER 367; [1964] AC 1129 has held that English courts have recognised the awarding of exemplary damages, that is, damages whose object was to punish or deter and which were distinct from aggravated damages (whereby the motives and conduct of the defendant aggravating the injury to the plaintiff would be taken into account in assessing compensatory damages), and there were two categories in which an award of exemplary damages could serve as a useful purpose, viz, in the case of oppressive, arbitrary or unconstitutional action by the servants of the government, in the case where the defendant's conduct had been calculated by him to make a profit for himself, which might well exceed the compensation payable to the plaintiff (see *Sakshi Sharma w/o Rajesh Sharma and others v State of Himachal Pradesh and others* [2012] Indlaw HP 1474). The Indian courts have been cautious in granting exemplary damage in ordinary tort claims. In *Common Cause, a Registered Society v Union of India* (1999) 6 SCC 667 it was stated:

> In an action for tort where the plaintiff is found entitled to damages, the matter should not be stretched too far to punish the defendant by awarding exemplary damages except when their conduct, specially those of the government and its officers, is found to be oppressive, obnoxious and arbitrary and is, sometimes coupled with malice If we were to apply the rule in *Rookes v Barnard* [1964] 1 All ER 367 invariably and unhesitatingly and were to award exemplary damages in every case involving government officers or government servants, the result would be appalling.

(j) The reason for awarding exemplary damages was addressed in *Rookes v Barnard* as follows:

> There are certain categories of cases in which the award of exemplary damages can serve useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into civil law a principle which ought logically to belong to criminal.

(k) In essence, English and Indian case laws recognises that courts on extraordinary facts and circumstances to maintain social discipline and rule of law must take punitive measures by awarding damages for unlawful act. The English courts in the recent case of *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975 (HL) have gone to say that exemplary damages which is statutorily barred in tortuous claim by virtue of the English Law Reform (Miscellaneous Provisions) Act 1934, is maintainable if the claim is premised on breach of fundamental guarantees enshrined in the Federal Constitution. This part of the jurisprudence is well captured and articulated by His Lordship David Wong Dak Wah in the case of *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353,

often referred to *Kugan*'s case High Court citation [2014] 8 MLJ 625; [2013] 6 CLJ 272.

(l) The Indian Supreme Court even before *Ashley*'s case have made it clear that a breach of fundamental guarantees under the Constitution will attract exemplary damages as of right, independent of tortuous claim (see *K Elango and others v Secretary of State of Tamil Nadu and others* [2013] Indlaw Mad 1425).

(m) In *DK Basu v State of West Bengal* (1997) 1 SCC 416, the Supreme Court of India in dealing with their art 21 (which is similar to our art 5 of the Federal Constitution) and s 330 of the Penal Code (which is similar to our s 331 of the Penal Code) had this to say:

> Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rules of law. The rights inherent in Arts 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. Court cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Art 21 of the Constitution, whether it occurs, during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchanism. No civilised nation can permit that to happen. Does a citizen she off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'. The precious right guaranteed by Art 21 of the Constitution of India cannot be denied to convicts, under trials, detainers and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.
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> Further the court on s 330 and its relevance to damages stated:
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> ... S 330 of Penal Code, directly makes torture during interrogation and investigation punishable under the Indian Penal Code. It is however, inadequate to repair the wrong done to the citizen. Prosecution of the offender is a obligation of the State in case of every crime but the victim of crime needs to be compensated monetarily also. The Court, where the infringement of the fundamental right is established, therefore, cannot stop by giving a mere declaration. It must proceed further and give compensatory relief not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for wrong done, due to breach of public duty by the State of not protection the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience.

(n) In *Nilabati Behera @ Lalitha v State of Orissa and others* AIR 1993 SC 1960, the Indian Supreme Court went to say that court can evolve new

tools and mould remedy to provide redressal in case of deprivation of fundamental right guaranteed under art 21 (Malaysia — art 5). The court held:

> 15 ... Convicts, prisoners or under-trials are not denuded of their fundamental rights under Art 21 and it is only such restrictions as are permitted by law, which can be imposed on the enjoyment of the fundamental rights by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation as *exemplary damages*, in proceedings u/art 32 by the Supreme Court or u/art 226 by the High courts, for established infringement of the indefeasible right guaranteed under Art 21 is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the Court moulds the relief by granting 'compensation' in proceedings u/art 32 or 226 seeking enforcement or protection of fundamental rights. It does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty of not protecting the fundamental rights of the citizen. *The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a Court of competent jurisdiction or/and prosecute the offender under the penal law.* (Emphasis added.)

(o) From the reading of Indian Supreme Court decision as well as the House of Lords (PC) decision in *Ashley*'s, it is trite that courts as guardian of the Constitution are bound to arrest any form of breach of fundamental guarantees by providing exemplary damages as a tool for relief which has been extracted and extended from the decision in *Rookes v Barnard*. In consequence, a bar to claim exemplary damages under Civil Law Act in private law remedy will not apply in the arena of public law relief as well as remedy.

(p) As we said earlier the plaintiffs' submission on quantum for exemplary damages is not satisfactory even though the pleaded case of plaintiff is a sum of RM1m. What should be the quantum will depend on the facts of the case as well as the rampancy of the breach by public authorities to attract deterrence and to ensure they abide by the Constitution and rule

of law. In *Ganesan and another v State of Tamil Nadu and others* [2012] Indlaw Mad 45; 2012 (2) CTC 848, Justice KK Sasidharan had this to say:

> QUANTUM:
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> The remaining question pertains to the amount of compensation. There cannot be any rigid or mathematical precision or strait-jacket formula in the matter of determination of compensation in public law proceedings. The compensation is in the nature of exemplary damages awarded against the wrong doer. It is open to the Court to adopt certain guidelines in the matter of assessment of compensation.

(q) We would have been minded to award the sum of RM1m if the plaintiffs had led evidence to justify the quantum. Taking into consideration the allegation of the state, we take the view it will be more appropriate to award quantum for exemplary damages of RM300,000 as was given in the case of *Kugan*.

[16] For reasons stated above, we allow the appeal and set aside the order of the High Court. The defendants to pay the plaintiffs a sum of (a) RM51,000 for dependency; (b) a sum of RM300,000 for exemplary damages; and (c) with costs here and below. On the issue of costs, interest and other consequential orders, etc (if necessary to deal with payment to the plaintiffs who are minors), we shall hear the submission and make the orders.

Appeal allowed.

Reported by Afiq Mohamad Noor